Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MIGUEL ANGEL MARTINEZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals For Texas

PETITION FOR WRIT OF CERTIORARI

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48pp

QUESTIONS PRESENTED

Whether the failure to specifically instruct the jury that it may not impose a penalty of death based upon a co-defendant's responsibility and moral guilt is fundamental error which the Appellate Court cannot evaluate for harm.

Whether imposition of death violates the eight amendment because the jury is instructed in a manner which allowed it to consider evidence of petitioner's co-defendant's responsibility and moral guilt.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REFERENCE TO OPINION IN THE CASE 1

GROUNDS FOR JURISDICTION 1

STATEMENT OF THE CASE WITH BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE 1

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminate, 474 U.S. 376 (1986) 11

Cabana v. Bullock, 474 U.S. 376 (1986) 11, 12

Enmund v. Florida, 458 U.S. 782 (1982).....11, 12

STATUTES

28 U.S.C § 1257 1

Article 37.071 Texas Code of Criminal Procedure 11

Article 37.071 § 3(b)(1) Texas Code of Criminal Procedure 2

Article 37.071(h) Texas Code of Criminal Procedure 1

MISCELLANEOUS

Eighth Amendment United States Constitution 12

The Petitioner Miguel Angel Martinez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals, entered in the above proceeding on December 14, 1994.

REFERENCE TO OPINION IN THE CASE

The judgement and opinion of the Texas Court of Criminal Appeals is *Martinez v. State*, No. 71-481, slip op. (Tex.Crim.App. December 14, 1994) appendix pp. 1a-45a.

GROUNDS FOR JURISDICTION

This Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. § 1257.

STATEMENT OF THE CASE WITH BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

This petition seeks review of the Texas Court of Criminal Appeals' decision affirming Miguel Angel Martinez' conviction and sentence of death. The Texas District Court had jurisdiction of this case pursuant to § 19.03 of the Texas Penal Code. The Texas Court of Criminal Appeals had jurisdiction pursuant to Article 37.071(h) of the Code of Criminal Procedure. An appeal in a death case is automatic in Texas.

On April 4, 1992, Petitioner was convicted of capital murder. The jury answered the two issues yes which resulted in the Trial Court pronouncing that a penalty of death would ultimately be imposed.

The Trial Court did not instruct the jury that only the Petitioner's responsibility and guilt could be applied to the special issues during the sentencing phase of trial. It merely stated "the instructions pertaining to the law of parties as govern in the guilt/innocence phase cannot be considered." IR371; XIIR709 Since Petitioner's offense occurred on January 18, 1991, the Punishment Special Issue number one given at Petitioner's trial stated:

> "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" Texas Code of Criminal Procedure Article 37.071 § 3(b)(1) (1991).

This special issue allows the jurors to consider the responsibility and moral guilt of Petitioner's Co-defendant. Petitioner objected to the charge of the Court in writing as follows:

> "The defendant objects to the charge as a whole and in particular to that part of the charge concerning the issue in the abstract as well as in the special issue submission that the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would result, and says, the same is insufficient

> both in the abstract and in the special issues at law for the reason that it fails to instruct the jury in the abstract and in the special issue instructions that only the conduct of the defendant can be considered in determining the answer to said issues, and that the instructions pertaining to the law of parties as given in the guilt/innocence phase cannot be considered." IR371.

The punishment phase jury charge makes one minor reference to the Petitioner acting alone.

> "You are further reinstructed that in answering the issues submitted to you, you will confine yourselves, in answering the following issues to the conduct and acts of the defendant standing alone." IR483.

In the same jury charge the jurors are directed to consider:

> "You are further instructed that in determining each of these special issues *you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant,* and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you." IR484. [emphasis added]

The punishment phase jury charge gives more emphasis to the evidence and charge of the guilt/innocence phase than it does to the Petitioner's individual conduct. The charge mandates the jury to consider the guilt/innocence phase.

The guilt/innocence jury charge stressed the "law of the parties" and the resulting criminal culpability for the conduct of others. The guilt/innocence jury charge stated:

> "All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, but the conduct of another for which he is criminally responsible, or both.
>
> A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.
>
> III
>
> Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that on or about the 18th day of January, 1991, in Webb County, Texas, MIGUEL ANGEL VENEGAS did intentionally or knowingly cause the death of more than one individual, in the same criminal transaction, to-wit: JAMES D. SMILEY, DANIEL DUENEZ, and RUBEN MARTINEZ, JR. with a deadly weapon, to-wit: a knife, that in the manner of its use or intended use was capable of causing serious bodily injury or death, and by striking JAMES D. SMILEY and RUBEN MARTINEZ, JR., with an axe, and that the defendant, MIGUEL ANGEL MARTINEZ, then and there knew of the

intent, if any, of said MIGUEL ANGEL VENEGAS, to stab JAMES D. SMILEY, DANIEL DUENEZ, AND RUBEN MARTINEZ, JR. and to strike with an axe JAMES D. SMILEY AND RUBEN MARTINEZ, JR., and the defendant, MIGUEL ANGEL MARTINEZ, acted with intent to promote or assist the commission of the offense by MIGUEL ANGEL VENEGAS by aiding or attempting to aid, MIGUEL ANGEL VENEGAS to commit the offense of murder, causing the deaths of JAMES D. SMILEY, DANIEL DUENEZ and RUBEN MARTINEZ, JR., you will find the defendant, MIGUEL ANGEL MARTINEZ, guilty of capital murder as charged in the indictment; or

If you find from the evidence beyond a reasonable doubt, that on or about the 18th day of January, 1991, in Webb County, Texas, as alleged in the indictment, the defendant, MIGUEL ANGEL MARTINEZ, did then and there intentionally and knowingly murder more than one person in the same criminal transaction, to-wit: did then and there intentionally and knowingly cause the death of an individual to-wit: RUBEN MARTINEZ, by stabbing the said RUBEN MARTINEZ with a deadly weapon, to-wit: a knife, that in the manner of its use or intended use was capable of causing serious bodily injury or death and MIGUEL ANGEL VENEGAS did then and there intentionally and knowingly cause the death of JAMES SMILEY AND DANIEL DUENEZ, by striking them with an axe and stabbing them with a knife, and MIGUEL ANGEL MARTINEZ did then and there know of the intent, if any, of the said MIGUEL ANGEL VENEGAS to strike and stab the said JAMES D. SMILEY and DANIEL

> DUENEZ, and the defendant MIGUEL ANGEL MARTINEZ, acted with the intent to promote or assist in the commission of the offense by aiding or attempting to aid MIGUEL ANGEL VENEGAS, to commit the offense of causing the death of JAMES D. SMILEY and DANIEL DUENEZ, then you will find the defendant, MIGUEL ANGEL MARTINEZ, guilty of capital murder.
>
> Unless, if you so find beyond a reasonable doubt or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and proceed to consider the lesser included offense of murder." IR376 - 378.

The State offered only one witness (James Grigson, M.D.), XIIR554 - 586, whose testimony referred to special issue number two, criminal acts of violence in the future, XIIR559, 23 - 560, 10, and did not address the issue of deliberateness.

The evidence offered to convict the Petitioner consisted primarily of his written statement, the testimony of accomplice Flores, and the hearsay confession of accomplice Venegas. Petitioner's written statement indicates:

> "Me and Miguel F. Venegas went to Smileys house on Thursday night. Venegas had an ax & a black knife. I carried the folding knife. We went to destroy the house around 1 or 2 AM. I though [sic] the house was empty. Venegas opened the door with spare key. Venegas went in first & said a guy was on the couch. I went in to see. I told him I didn't know who he was. We went back out and I told him let's split. He said no because Satan wanted their souls. He went back in an hit him once on the head with the ax.

> The guy made a funny noise, and got Miguel's black shirt & covered his mouth. Venegas first poked him with a knife then I. He gave me a pillow to put on his head & then said he was gone. Venegas crossed into the other room and Stabbed the kid. (I) went to the hall & saw Venegas getting air. I told him I was freaking out he said "I'll take care of it give me the ax. I gave it to him & I walked out of the house. I was walking back in and heard a hit I walked to hall & he came out of Smileys room. He said the cross was upside down. He said he would get the keys & we would leave. I got the phone & he put T.V. in car, inside the garage. We left the car at Dr's Hosp., and walked to his house to spend the night. The next day, around 3 p.m. he took me to a friends house then he picked up Mike Otero and Ray Rodriguez, & went to mall & saw Raymond Gutierrez there. Ax was in trunk. He dropped me home. He left with Raymond to sell T.V. & car." XIIIRSXI.

Petitioner's statement indicates presence at the scene but does not express the deliberateness required for a "yes" answer to special issue 1.[1] Petitioner's purpose was to "trash a house." Petitioner wanted to "split" when he saw someone on the couch. Petitioner did not "give careful consideration" rather acted hastily and at Venega's direction. The only person who acted "deliberately" was Venegas.

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[1] The charge defined "deliberately" as used in special issue Number 1 . . . as with careful consideration or deliberation; with full intent; not hastily or carelessly – as a deliberately formed purpose; with awareness of the consequences." IR482.

FLORES' TESTIMONY

Flores' testimony corroborates Petitioner's statement. On the night of the deaths, Flores, Petitioner, and Flores' girlfriend were partying. XIR128. Around 10:20 PM after dropping off Flores' girlfriend, Flores and Martinez went to Flores' house and continued to party. XIR128. Venegas unexpectedly "showed up" about midnight wishing to trash someone's house. XIR129, 1 - 14. Then Petitioner looks for tools to trash a house, XIR130, 1 - 131, 10, finding two knives. Petitioner and Venegas also find an ax to trash the house. XIR131, 10 - 132, 9. Flores drives Petitioner and Venegas to Smiley's house and leaves. XIR132, 14 - 19.

Subsequently Flores testifies as to Petitioner's account given to Flores at school the following Monday of what transpired at Smiley's house.

> Q. [prosecutor] Go ahead. They went to the back of the house, and then what happened.
>
> A. [Flores indicating what Petitioner told him] They [Petitioner and Venegas] went to the sliding wood door and they looked in and he saw somebody on the couch so he [Petitioner] said he didn't want to be there no more, he wanted to leave.
>
> Q. Okay
>
> A. And Venegas said they had to do it.
>
> Q. Okay
>
> A. Anyway, so then Venegas went in and he went in with him and then Venegas hit a man on the face with an ax, and then he said that Venegas stood back and told him

that it was his turn to do it, and he said he wanted to leave, that he didn't want to do it but Venegas told him to do it anyway. So he got on top of the man and stabbed him, he said.

Q. Did he tell you anything else?

A. He said that after he stabbed him he threw up.

Q. Okay. Did he tell you anything else?

A. And then, uh, he got up and he wanted to leave but Venegas told him to wait, to stand by another room and Venegas went into another room and killed the little boy and then came back and went into the last room and killed Smiley.

Q. Okay. Was there anything else?

A. No, that's all. XIR134, 7 - 135, 6.

Flores' testimony implicates Venegas but not Petitioner in a deliberate act. Petitioner acts "hastily" and only with the purpose to "trash a house," and at Venegas' direction.

The only other direct reference to the events at Smiley's house are provided by Orlando Lopez testifying as to what Venegas told him.

A. [Lopez on direct by prosecutor] Yeah. He [Venegas] told me how he did it and I asked him, well, like I wasn't interested because I didn't believe him, so I thought he was just joking around so I told him to explain to me like how did you kill him and then he told me that him and another guy, him, went into the house and he told me that first he went inside and there was a guy on the

> couch and that he just hit him in the head with an ax and that his other friend stabbed him and then got nervous or something and then he went on into the other two rooms and killed the other two people in the house with the ax, and that's all he told me and I told him to take me home. . . . XIR341, 10 - 20

Lopez's rendition of what Venegas told him confirms that Venegas was the primary actor, acted deliberately and corroborates both Petitioner's written statement and Flores' testimony that Petitioner did not have the purpose required and acted hastily.

The evidence clearly indicates two different purposes and a lack of deliberateness on the part of the Petitioner. To not explicitly direct the jury to only consider the purpose and deliberateness of Petitioner harmed the Petitioner because of the level of purposefulness and deliberateness with which Venegas acted. The court's error in not specifically directing the jury not to consider Venegas' purpose and conduct harmed Martinez by encouraging the jury to apply Venegas' deliberateness and future dangerousness to Petitioner.

The instruction given allowed the jurors to sentence petitioner to death based upon the acts of his co-conspirator.

The prosecutors argued the law of parties in closing to urge the jury to return a punishment of death.

> "Mr. Rubio: We need to tell them what we're not going to tolerate, because if this person gets life imprisonment the message that's being sent out is – you can go to someone's house in the

middle of the night while they're asleep, kill one person and assist and aide in killing two others and get a life imprisonment for it."

REASONS TO GRANT WRIT

1. ABSENCE OF INSTRUCTION SHAKES STRUCTURE OF TRIAL

Omission of a jury instruction that Petitioner may not be sentenced to death based upon the conduct and moral guilt of his co-defendant created the risk that the jury did so. *Enmund v. Florida*, 458 U.S. 782, 801 (1982). *Cf. Arizona v. Fulminanate*, 499 U.S. 279, 291 (1991), *Enmund* requires Petitioner be sentenced for his "personal responsibility and moral guilt." The lack of an instruction telling the jurors that they could only choose death based on the Petitioner's intent or conduct was like instructing them they could base their decision on the conduct and intent of the co-defendant. The choice must be made by the jurors in the trial Court. It is not appropariate for the Court of Appeals to make this determination. The jury has to be equiped with instructions to properly perform this task. *Cabana v. Bullock*, 474 U.S. 376, 386 (1986).[2]

The jury members therefore must receive a carefully structured instruction setting forth the categorical rule that

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[2] Unlike *Cabana*, here Texas has in place a law § 370.71 of the Texas Code of Criminal Procedure. *See, Cabana v. Bullock*, 474 U.S. 376, 406 N.5.

> "A person who has not in fact killed, attempted to kill, or intended that a killing take place of that lethal force be used may not be sentenced to death." *Cabana v. Bullock*, 474 U.S. 376, 386 (1986).

2. NO ASSURANCE DEATH SENTENCE BASED KILLING ATTEMPTED TO KILL OR INTENT TO KILL

Because the jury instructions given, the argument of the State, and the lack of an instruction setting out the categorical rule, this death sentence may be imposed on a person the jurors did not find killed, attempted to kill or intented to kill. *See Cabana v. Bullock*, 474 U.S. 376, 386 (1986). Texas Law requires that the jurors decide punishment in a death penalty case. 37.071 Texas Code of Criminal Procedure. Sentencing a person to death on less violates the proportionality requirement of the eighth amendment. *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Cabana v. Bullock*, 474 U.S. 376, 391 (1986).

> "First, to the extent that Enmund recognizes that a defendant has a right not to face the death penalty absent a particular factual predicate, it also implies that the State's judicial process leading to the impostion of the death penalty must at some point provide for a findings of that factual predicate." *Cabana v. Bullock*, 474 U.S. 376, 390-391 (1986).

CONCLUSION

The writ for certiorari should issue.

Respectfully Submitted,

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MIGUEL ANGEL MARTINEZ, Appellant	Appeal from the 341st District Court of Webb County
v.	
THE STATE OF TEXAS, Appellee	No. 71,481

OPINION

Appellant, Miguel Angel Martinez, was convicted of capital murder after a jury found him guilty under Texas Penal Code § 19.03(a)(6)(A) of murdering more than one person during the same criminal transaction.[1] Punishment was assessed at death. Appeal to this Court is automatic under Article 37,071(h).[2] We will affirm.

On appeal, appellant raises twenty six (26) points of error, in which he argues that: there was insufficient evidence to find him guilty of capital murder; there was insufficient evidence to impose the death penalty; he was illegally prosecuted because of his race; his confession was inadmissible because of an illegal seizure; trial court errors during voir dire denied him an impartial jury; the State made improper remarks during closing argument; the trial court should have given an anti-parties charge during the punishment phase; a federal treaty prohibits sentencing him to death because of his age; and that he is entitled to a new trial because parts of the trial record

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[1] The 1995 version of the Texas Penal Code lists this provision under § 19.03(a)(7)(A).

[2] All articles cited are contained in the Texas Code of Criminal Procedure, unless otherwise noted.

have been lost or destroyed. We will address the sufficiency points first and then analyze the others in chronological order.

In his twenty-third point of error, appellant argues that the State presented insufficient evidence during the guilt/innocence phase of the trial to establish beyond a reasonable doubt that he acted with the requisite intent to promote or assist his cohort Manuel Angel Venegas in the murders of Daniel Duenez and James D. Smiley. Specifically, appellant contends that his cohort Venegas forced him to participate in these killings. Appellant does not contest the fact that he intentionally stabbed and killed the third victim, Ruben Martinez, Jr. (R. Martinez). The State, in response, argues that: "[t]here is absolutely nothing . . . in the record of this case indicating or even inferring (sic) that . . . Venegas forced or coerced appellant to do anything. . . . "[3]

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[3] At the time of trial, § 19.03(a)(6)(A) of the Texas Penal Code provided that a person commits capital murder if the person murders two or more persons during the same criminal transaction. As such, appellant's conduct would constitute capital murder under the *statute* if he killed or was a party to the killing of *any two* of the three victims in this case.

The jury charge, however, required a finding that appellant intentionally killed or intentionally promoted and assisted his cohort Venegas in killing *all three* of the victims. This Court has long recognized that when the State fails to object to a charge which elevates its burden of proof above that required by statute, the sufficiency of the evidence will be measured against the heightened burden contained in the charge. *Fee v. State*, 841 S.W.2d 392, 396 (Tex.Cr.App. 1992). As a result, there must have been sufficient evidence that appellant was a party to the murders of all three victims. Appellant does not challenge the sufficiency of the evidence to prove that he murdered the first

Viewed in the light most favorable to the verdict, the testimony at appellant's trial established the following: Around January of 1989, appellant worked as an employee at an Arby's restaurant managed and partially owned by Smiley. On numerous occasions during his employment, appellant borrowed Smiley's house keys to retrieve items from the residence where the murders were carried out, and even lived at the house for a short period of time after being evicted from the home of his parents. At some time prior to January 17, 1991, appellant was fired from his job.

On January 17, 1991, appellant and Manuel Flores spent the evening hours drinking at Flores' residence in Laredo. Venegas arrived at the residence around midnight. Soon after he appeared, Venegas stated that he wished to "trash" somebody's house. Appellant responded that he knew a house which they could trash, and then asked Flores whether he could borrow a gun for the evening. Flores denied the request, explaining to appellant that all of his guns were locked in a safe. All three individuals then proceeded into Flores' bedroom. Appellant found a large dagger and a pocket knife in the bedroom, and he found an ax in a nearby storage room. He asked to borrow all three, and Flores consented.

Armed with the two knives and the ax, appellant and Venegas had Flores give them a ride to the Del Mar section of Laredo. Appellant directed Flores to Smiley's

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victim, R. Martinez. As such, we must determine whether the State produced sufficient evidence at trial to prove that appellant acted with the intent to promote or assist in the killings of *both* Daniel Duenez and James Smiley, the other two victims.

residence. Shortly thereafter, appellant and Venegas entered the house. Duenez, Smiley, and R. Martinez were subsequently killed as they slept in three different rooms of the residence.

Three days after the murders, appellant admitted to Flores that he had stabbed R. Martinez – the first victim killed. While making this admission, appellant appeared "excited," "[l]ike . . . he had won a million dollars."

Besides testimony, the State's evidence included appellant's written confession, which he gave to the Laredo Police Department four days after the killings:

> Me and Miguel A. Venegas went to Smileys house on Thursday night. Venegas had an ax & a black knife. I carried the folding knife. We went to destroy the house around 1 or 2 a.m. I thought the house was empty. Venegas opened the door with spare key. Venegas went in first & said a guy was on the couch. I went in to see. I told him I didn't know who he was. We went back out and I told him let's split. He said no because Satan wanted their souls. He went back in and hit him once on the head with the ax. The guy made a funny noise, and got Miguel's black shirt & covered his mouth. Venegas first poked him with a knife then I. He gave me a pillow to put on his head & then said he was gone. Venegas crossed into the other room and stabbed the kid. (I) went to the hall & saw Venegas getting air. I told him I was freaking out he said "I'll take care of it give me the ax. I gave it to him & I walked out of the house. I was walking back in and heard a hit I walked to hall & he came out of Smileys room. He said the cross was upside down. He said he would get the keys &

> we would leave. I got the phone & he put T.V. in car, inside the garage We left the car at Dr's Hosp., and walked to his house to spend the night. The next day around 3 p.m. he took me to a friends house. then he picked up Mike Otero & Ray Rodriguez, & went to mall & saw Raymond Gutierrez there. Ax was in trunk. He dropped me home. He left with Raymond to sell T.V. & car. (Sic et passim.)
>
> Miguel A. Martinez
> /s/

In determining whether the State produced sufficient evidence to support a guilty verdict, the relevant question is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We hold that the State produced sufficient evidence for a rational jury to have concluded beyond a reasonable doubt that appellant acted with the intent to promote or assist in the killings of Duenez and Smiley.

Typically, the State can only prove that a defendant acted intentionally by asking the jury to make rational inferences based upon the actions of the defendant and the circumstances surrounding the crime. As one observer has noted:

> It is not always easy to prove at a later date the state of a man's mind at that particular earlier moment when he was engaged in conduct causing or threatening harm to the interests of others. He does not often contemporaneously speak or write out his thoughts for others to read. He will not generally admit later to having

> the intention which the crime requires. So of course his thoughts must be gathered from his words (if any) and actions in the light of all the surrounding circumstances. Naturally, what he does and what foreseeably results from his deeds have a bearing on what he may have had in his mind.

W. LaFave & A. Scott, Jr., *Criminal Law* § 3.5(f), at 226 (2nd ed. 1986). Consistent with this analysis, we have previously held that, in determining whether a defendant had the requisite mental state to be considered a party to an offense, a jury "may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Cordova v. State*, 698 S.W.2d 107, 111 (Tex.Crim.App. 1985), appeal dismissed, *cert. denied*, 476 U.S. 1101, 106 S.Ct. 1942, 90 L.Ed.2d 352 (1986), reversed and remanded on other grounds, 838 F.2d 770 (5th Cir. 1988).

With regard to the killing of Smiley, appellant admitted in his confession that he handed to Venegas the murder weapon used to kill Smiley after Venegas said to him, "I'll take care of it[;] give me the ax." A rational jury certainly could conclude that appellant understood the phrase, "I'll take care of it," to mean that Venegas intended to kill Smiley with the ax, given that Venegas had just attacked and killed the other two occupants of the house and had not yet entered Smiley's bedroom. The handing over of the ax under these circumstances could rationally be viewed as an act intended to promote or assist in the killing of Smiley.

With regard to the killing of Duenez, we find compelling the fact that appellant, while preparing to "trash" Smiley's house, asked Flores to loan him a gun, a weapon designed for the taking of human life – not the destruction of property. Appellant also played an active role in procuring from Flores two large knives and an ax, items which by their very nature can be used as deadly weapons, and all of which were ultimately used to carry out the murders of Martinez, Duenez and Smiley. In addition, appellant had been recently fired from his job at a restaurant managed by Smiley, was familiar with Smiley's house, and personally selected that house as the one to be "trashed." Once at the residence, appellant overtly assisted in the first and third murders by stabbing Martinez and by handing Venegas the ax used to kill Smiley. At no point during this slaughter did appellant decide to abandon the crime. Indeed, after the three victims had been killed, appellant assisted Venegas in the theft of a telephone, a television set, and Smiley's automobile. Finally, no evidence at trial indicated that the Smiley household was physically damaged by appellant or Venegas.

Looking at this evidence in the light most favorable to the verdict, we hold that a rational jury could have concluded that appellant intended to assist in the burglary of the Smiley household and the killing of any and all persons present in the house. Given that all three victims were murdered in quick succession and that appellant overtly assisted in the first and third murders, we believe that a jury could rationally find that appellant intended that the second victim (Duenez) also be killed.

Admittedly, appellant stated in his written confession that he believed the house would be empty, and that he was a reluctant participant in the actual killings. The jury, however, was the sole judge of the credibility of the evidence, whether presented through live testimony or written statements. *Bonham v. State*, 680 S.W.2d 815, 819 (Tex.Crim.App 1984). In this case, appellant asserted his belief that the house was empty in spite of the fact that he entered the Smiley residence in the early morning hours of a weekday – a time when most persons are at home asleep. We also note that appellant's statements – that he believed the house to be empty and that he wanted to leave the premises once he discovered that the house was occupied – were, by their nature, self-serving because, if believed, they would support appellant's claim that he did not intend to kill anyone that evening. As such, we find that a rational jury could have chosen to give little weight to, or even disregard, those statements. Appellant's twenty-third point of error is, therefore, overruled.

In his sixth point of error, appellant contends that the State produced insufficient evidence for the jury, when presented with the first special issue during the punishment phase of the trial, to have found beyond a reasonable doubt that he deliberately caused the deaths of the three victims.[4] Appellant argues that the evidence

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[4] Pursuant to Article 37.071(b), the punishment charge presented to the jury the following two special issues:

SPECIAL ISSUE I

Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of RUBEN MARTINEZ, JR., JAMES D. SMILEY and DANIEL DUENEZ would result?

showed he "acted hastily and was pressured by Venegas" on the night of the murders. The State, on the other hand, asserts that the State presented sufficient evidence that appellant acted deliberately during the preparation and execution of the murders.

In answering the special issues, a jury may consider all of the evidence presented during both the guilt/innocence and the punishment phases of the trial. *Narvaiz v. State*, 840 S.W.2d 415, 424 (Tex.Crim.App. 1992), *cert. denied*, 113 S.Ct. 1422 (1993); *Harris v. State*, 790 S.W.2d 568, 577 (Tex.Crim.App. 1989); *Green v. State*, 682 S.W.2d 271, 287 (Tex.Crim.App. 1984). Moreover, a jury may accept or reject any or all of the evidence presented by either side at either phase of the trial. *Valdez v. State*, 776 S.W.2d 162, 166-67 (Tex.Crim.App. 1989).

The jury in this case heard evidence during the guilt/innocence phase that appellant, at a minimum, took the following actions which eventually led to the deaths of the three victims: he actively procured the two hunting knives and the ax used in the murders; he selected his ex-employer's house as the one to be "trashed"; he personally stabbed Martinez, and he handed Venegas the ax

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SPECIAL ISSUE II

Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Because the jury answered "yes" to both special issues, appellant received the death penalty instead of a life sentence. (The Legislature in 1991 modified this article by removing Special Issue I. In this case, however, the trial court properly submitted Special Issue I to the jury, as the effective date of the modification was September 1, 1991.)

used to murder Smiley. We have already held that a rational jury could have found that all of these acts were intended to cause death. A rational jury could also have found that such intentional acts were deliberate if there was sufficient evidence that "appellant's conduct arose from a conscious decision, after at least brief consideration, to cause . . . death." *Narvaiz v. State*, 840 S.W.2d at 424. We hold that there was sufficient evidence to show deliberation in this case.

Before the murders, appellant attempted to procure a gun from his friend Manuel Flores. Appellant then conducted an extensive search through Flores' bedroom and a storage room, eventually arming himself with the weapons used in the murders. Appellant had more than adequate time during this process, and during the subsequent ride to the Smiley residence, to at least briefly consider his actions and to form his general intent to kill.

Once at the Smiley residence, appellant was present when his accomplice Venegas began the assault on Martinez. As such, a rational jury could find that appellant had the requisite time to deliberate over what he would do before joining in the attack. In addition, Dr. Susanne Dana, the Bexar County forensic pathologist who performed the autopsies on all three victims, testified that the eight stab wounds found on the chest of Martinez were possibly made by a weapon that was narrower and shorter than the weapon used to stab Duenez and Smiley. Appellant's confession indicated that on the evening in question he armed himself with a folding pocket knife. His confession further revealed that Venegas was in possession of the other knife taken from Flores' house, and that Venegas carried out the murders of the second and

third victims (Duenez and Smiley). Flores (the owner of the knives) testified that the knife carried by appellant was two inches shorter than the dagger carried by Venegas. From this evidence, a rational jury could conclude that appellant inflicted all eight of the stab wounds found on R. Martinez. Appellant's repeated stabbing of Martinez was sufficient evidence for the jury to have concluded that his actions were deliberate, and not sudden or impulsive in nature. *See Narvaiz v. State*, 840 S.W.2d at 424.

Finally, appellant handed Venegas the ax used to kill Smiley after the first two victims had been killed and after Venegas told him "I'll take care of it[;] give me the ax." Again, that situation presented appellant with adequate time to reflect upon his actions. In sum, we hold that the State produced sufficient evidence for a rational jury to have found beyond a reasonable doubt that appellant acted deliberately in his actions which led to the deaths of all three victims. Appellant's sixth point of error is overruled.

The second special issue required the jury to determine whether a probability existed that appellant would commit violent criminal acts in the future.[5] The jury found that such a probability did exist, and answered the special issue in the affirmative. Appellant now contends, in point of error number seven, that there was insufficient evidence to rationally support that finding. Specifically, appellant argues that the psychiatric testimony he offered

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[5] See fn. 4, *supra*, for the specific language of Special Issue II.

on the issue of future dangerousness offset that of the State, that the evidence shows his cohort Venegas "forced" him to participate in the murders, and that his participation in the murders was "a radical departure from the general pattern of [his] life." In response, the State argues that the gruesome nature of the murders, coupled with the testimony of the State's psychiatric expert, provided sufficient evidence to rationally support a finding of future dangerousness.

We have already summarized the evidence presented during the guilt/innocence phase of the trial. During the punishment phase, the State presented testimony from Dr. James Grigson, a psychiatrist who had previously examined over 13,000 criminal defendants, and who had testified as a medical expert in over 2,000 criminal cases. In addition, Dr. Grigson had examined over 400 defendants charged with capital murder, and in 144 of those cases had been called as a testifying expert. After the State presented him with a hypothetical scenario based upon appellant's conduct on the night of the murders, Dr. Grigson expressed his opinion that the appellant would constitute a continuing threat to society.

Appellant, in turn, called thirteen witnesses to the stand during the punishment phase of the trial. Dr. Timothy Brown, a clinical psychologist and the only health professional called by appellant, stated that he had previously testified in thirty criminal cases, three or four of which had been murder cases. In none of those cases, however, had the defendant been charged with capital murder. Dr. Brown expressed his opinion that "the probabilities for [appellant] continuing to be a danger to society is [sic] low." He further testified that he was not

familiar with the trial testimony concerning the murders themselves, and therefore had not used such information in forming his opinion.

Appellant also called to the stand two ministers and three members of the church he attended in Laredo, his high school counselor and two of his high school instructors. Each of these witnesses described appellant as nonviolent, respectful and obedient. In addition, three individuals employed as educators for Webb County inmates testified that, during his incarceration pending trial, appellant scored well on numerous academic examinations and exhibited no violent behavior.

Finally, appellant's mother took the stand and testified that appellant had always been an "obedient son" and had done well in school. In the year preceding the murders, however, as her son became friendly with Venegas and Flores, his grades and school attendance slipped and he became emotionally distant from his mother.

Our role as an appellate court is not to determine how we would have answered the question on future dangerousness had we been the finder of fact. Rather, we must decide whether the State presented sufficient evidence for a rational jury to find beyond a reasonable doubt that a probability existed that appellant would commit violent criminal acts in the future. *Cantu v. State*, 842 S.W.2d 667, 674 (Tex.Crim.App. 1992), *cert. denied*, 113 S.Ct. 3046 (1993). In making that determination, a jury may consider a variety of factors, including, but not limited to, the following:

1. The circumstances of the capital offense;

2. The calculated nature of the defendant's conduct;

3. The deliberateness exhibited in the crime's execution;

4. The existence and severity of the defendant's previous offenses;

5. Whether the defendant was acting under duress or the domination of another at the time of the crime;

6. The defendant's age and personal circumstances;

7. Psychiatric evidence; and

8. Character evidence.

Id. at 674-675.

With regard to the psychiatric evidence presented during the punishment phase of the trial, the State produced an expert who was testifying for the one hundred and forty-fifth time in a capital murder proceeding. In contrast, appellant's expert, Dr. Brown, had never before testified in a capital murder trial. Presumably, Dr. Brown had never been called upon to give his opinion regarding the future dangerousness of a criminal defendant – an issue that only arises in capital murder trials. While this disparity in experience in no way means that Dr. Brown was unqualified to serve as a psychiatric expert in a capital murder proceeding, we nevertheless believe that it could serve as a rational basis for the jury to give more weight to Dr. Grigson's opinion that appellant would commit violent acts in the future.

In addition to the psychiatric testimony, the evidence surrounding the crime itself revealed that appellant acted in a calculated and deliberate manner in preparing for and planning the attack. Once at the Smiley residence, he actively assisted Venegas while the three victims were methodically killed as they slept. Such calculated conduct during the preparation and execution of an offense is proof that the defendant may commit violent acts in the future. *Cantu v. State*, 842 S.W.2d at 674-75. Additionally, four days after the murders, appellant relayed the details of the killings to his friend Flores and appeared, in Flores' words, "excited" "[l]ike . . . he had won a million dollars." Again, we have held that such lack of remorse indicates a threat of future violent activity. *Flores v. State*, 871 S.W.2d 714, 716 (Tex.Crim.App. 1993).

There was evidence that appellant exhibited no violent tendencies while attending school or church activities in the years preceding the murders, and that he behaved well while incarcerated pending trial. However, after considering all the evidence presented at trial in a light most favorable to the verdict, we hold that a sufficient basis existed for the jury to answer special issue number two in the affirmative. Appellant's seventh point of error is overruled.

In appellant's twentieth and twenty-first points of error, he claims that the Laredo Police Department illegally seized him at his home while investigating the crimes committed at the Smiley residence, in violation of his rights under the Fourth and Fourteenth Amendments and under Article 1, § 9, of the Texas Constitution. Appellant further argues that the written confession he subsequently gave at police headquarters should have been

suppressed by the trial court, as it was the fruit of that illegal seizure.

We need not consider appellant's state constitutional claim, as he presents no argument or authority as to any additional protections provided by Article 1, § 9, separate from those established by the Fourth and Fourteenth Amendments. Tex. R. App. Proc. 74(f) and 210(b); *Ex parte Granger,* 850 S.W.2d 513, 515, n. 6 (Tex.Crim.App. 1993). Point of error number twenty-one is overruled.

In denying appellant's motion to suppress, the trial court concluded that none of appellant's Federal Constitutional rights had been violated by the Laredo Police Department. Although the trial court did not explicitly determine whether appellant was "seized" by the police, we believe the record supports the conclusion that appellant was not "seized" at the time he was removed to headquarters and made his confession. We must uphold the trial court's overruling of the motion to suppress so long as the record supports any legal theory for doing so, whether or not that theory was enunciated by the trial court. *Calloway v. State,* 743 S.W.2d 645, 652 (Tex.Crim.App. 1988).

A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Florida v. Royer,* 460 U.S. 491, 502 (1983); *Russell v. State,* 717 S.W.2d 7, 10 (Tex.Crim.App. 1986). The record indicates that the policemen *invited* appellant to accompany them to the police headquarters to discuss the murders, without any insinuation that appellant would be forcibly

removed from his home if he declined that invitation. We further note that appellant was not handcuffed for the trip to the station. We believe that the record supports the conclusion that a reasonable person in appellant's place would have felt "free to leave," or, more precisely, free to decline the officers' invitation to be interviewed. In light of the absence of any Fourth Amendment "seizure," appellant's twentieth point of error is overruled.

In his twenty-fourth and twenty-fifth points of error, appellant contends that the Webb County District Attorney indicted him for capital murder and sought the death penalty (instead of pursuing multiple murder counts under Texas Penal Code § 19.02) because he is Hispanic and one of the victims was Anglo. As such, appellant argues that he was the victim of selective prosecution based on race, in violation of his rights under the equal protection clause of the Fourteenth Amendment and the equal rights provision of the Texas Constitution.[6]

A defendant must raise the issue of selective prosecution before or during trial in order to preserve it for appeal. *Gawlik v. State*, 608 S.W.2d 671, 673 (Tex.Crim.App. 1980). The record indicates that appellant raised his selective prosecution claim for the first time in his motion for new trial. As the issue has not been preserved, appellant's twenty-fourth and twenty-fifth points of error are overruled.

In points of error eight through eleven, appellant contends that the trial court erred by denying his motion for a mistrial, by failing to *sua sponte* grant additional

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[6] Article I, § 3.

peremptory challenges to strike jurors Villa and Barrera, and by failing to *sua sponte* grant additional voir dire of Villa and Barrera. Appellant contends that these errors denied him his right to an impartial jury under the Sixth and Fourteenth Amendments and Article 1, § 10, of the Texas Constitution. The State's position is that appellant failed to preserve error on these issues.

With regard to the claim that the trial court should have granted additional voir dire and peremptory challenges, appellant fails to direct us to any part of the record where his trial counsel requested additional challenges or voir dire time. Appellant also fails to cite any case in which this court has held that a trial court must grant additional challenges or time for voir dire *on its own motion*. As such, we agree with the State that appellant's complaint on these matters is not preserved for review.[7]

The record indicates that on the first day of voir dire, veniremembers Villa and Barrera were present during a

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[7] Texas Rule of Appellate Procedure 52(a) provides:

> In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. . . .

To preserve error regarding the make-up of the jury, appellant should have challenged Villa and Barrera for cause. Assuming that challenge was denied, he then would have to (1) use all his peremptory strikes, (2) ask for and be denied additional peremptories, and (3) show that he was forced to take an identified objectional juror who would otherwise have been struck. *See Green v. State*, 840 S.W.2d 394 (Tex.Cr.App. 1992), *cert. denied*, 113 S.Ct. 1819 (1993).

discussion of the case among veniremembers waiting to be individually examined. Both individuals were subsequently examined on the first day and selected for the petit jury. On the second day of voir dire, appellant's trial counsel learned of the discussion had among the veniremembers. Appellant's counsel then moved for a mistrial on the grounds that Villa and Barrera had failed to reveal the occurrence of this conversation during their examinations, and that such failure prevented counsel from adequately protecting appellant's rights through the voir dire process. The trial court denied the motion for a mistrial.

Appellant's eighth point of error was preserved when he moved for a mistrial and that motion was denied. A trial court must consider "the peculiar facts and circumstances of [the] case" in deciding whether a mistrial should be declared. *Hernandez v. State*, 805 S.W.2d 409, 414 (Tex.Crim.App. 1990), *cert. denied*, 500 U.S. 560 (1991). A trial judge "properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached. . . . " *Sewell v. State*, 696 S.W.2d. 559, 560 (Tex.Crim.App. 1983) (quoting *Illinois v. Somerville*, 410 U.S. 458, 464 (1973)). Only if such discretion is abused will this Court reverse a ruling on a motion for a mistrial. *Beets v. State*, 767 S.W.2d 711, 747 (Tex.Crim.App. 1987).

In this case, veniremember Levy indicated that some potential jurors had discussed the fact that two males, one a juvenile, had committed the murders. The veniremembers were also said to have speculated that the boys had been under the influence of narcotics or alcohol at the time of the crime. Levy stated that the identity of the assailants had not been discussed. Based upon this

record, we believe that the trial judge could have reasonably concluded that an impartial verdict could be reached with Villa and Barrera serving as jurors, despite their presence during this discussion. Points of error numbers eight through eleven are overruled.

In points of error thirteen through seventeen, appellant argues that the trial court erred by denying his challenges for cause against veniremembers Yolanda Levy, Melissa Andrews, Alejandro Valadez, Timothy Miles Jackson, and Orfa Judith Garcia. These denials, in appellant's view, deprived him of his right to an impartial jury.

To preserve error on a claim that the trial court erroneously denied a challenge for cause, an appellant must show:

1. The voir dire of the individual venireperson was recorded and transcribed.

2. The appellant at trial asserted a clear and specific challenge for cause *clearly articulating the grounds therefore.*

3. After the challenge for cause was denied by the trial court, appellant used a peremptory challenge on that juror.

4. All peremptory challenges had been exhausted.

5. When all peremptory challenges had been exhausted, appellant made a request for additional peremptory challenges.

6. Finally, that an objectionable juror sat on the case.

> The appellant should point out to the trial court he is being forced to try the case with a juror seated against whom he would have exercised a peremptory challenge had he one remaining.

Jacobs v. State, 787 S.W.2d 397, 405 (Tex.Crim.App. 1990), *cert. denied*, 498 U.S. 881 (1993). We must apply this standard to each of the five rulings denying appellant's challenge for cause to determine whether any error has been preserved for our review.

With regard to veniremembers Valadez and Jackson, appellant fails to cite any place in the record where defense counsel asserted a challenge for cause to strike those individuals. As such, appellant's contention that the trial court erred in denying his challenge for cause against Valadez and Jackson has been improperly briefed and has not been preserved for our review. Tex. R. App. Proc. 74(f) and 210(b); *Narvaiz*, 840 S.W.2d at 429.

Appellant's trial counsel did assert proper challenges for cause against veniremembers Yolanda Levy, Melissa Andrews, and Orfa Judith Garcia; therefore, we must consider the propriety of the trial court's decisions to overrule those challenges. The trial judge, because he is present to observe the veniremember, has the discretion to grant or deny a challenge for cause. *Allridge v. State*, 850 S.W.2d 471, 482 (Tex.Crim.App. 1991), *cert. denied*, 114 S.Ct. 101 (1993). With only the cold record at our disposal, we will not disturb a trial court's ruling on a challenge for cause unless it is clear that the court abused its discretion. *Adanandus v. State*, 866 S.W.2d 210, 222 (Tex.Crim.App. 1993), *cert. denied*, 114 S.Ct. 1338 (1994). We can discern no such abuse in the trial court's decision

in this case to deny appellant's challenges for cause against veniremembers Levy, Andrews, and Garcia.

At trial, appellant's sole basis for challenging veniremember Levy was that she along with jurors Villa and Barrera had violated an order from the court by discussing the case while waiting to be individually examined by counsel. Appellant's trial counsel presumably believed that such discussions had biased or prejudiced Levy against his client.[8] As we discussed *supra*, our review of the record reveals that Levy and other prospective jurors discussed the fact that two young men had committed the murders and that one was a juvenile. They also speculated that the two may have been under the influence of alcohol or narcotics at the time of the crime. In addition, the following exchanges occurred during examination of Levy by appellant's trial counsel:

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[8] Appellant clarifies in his brief that the purpose for challenging Levy was that "[s]he discussed the case with other jurors *and developed a presumption regarding appellant's guilt.*" Emphasis added. *See* Tex. Code Crim. Proc. § 35.16(9)(10).

Appellant also asserts in his brief that Levy should have been struck because, "[h]er concern for her children predisposed her to grant the death penalty and not consider mitigating circumstances." *See* Tex. Code Crim. Proc. § 35.16(c)(2). Appellant, however, never asserted this rationale at trial as a basis for his challenge for cause against Levy. As such, the appellant cannot ask us to find that the trial court erred by not striking Levy because of alleged prejudices concerning the death penalty and mitigating circumstances, when appellant himself never asked the trial court to rule on those issues in the first place. *See* Tex. R. App. Proc. 52(a); *Rezac v. State*, 782 S.W.2d 869, 870 (Tex.Crim.App. 1990).

Q: And in your discussions, was it discussed – was it conversed or discussed who killed these persons?

A: No.

Q: Nobody said anything as to who had done it?

A: No, nobody said anything, no.

* * *

Q: So concerning the presumption of innocence . . . what is your opinion of this young man [appellant] as of right now? What is the presumption right now in your mind?

A: Well, he's innocent until I have some evidence that he's proven guilty.

* * *

Q: And I asked you what was your presumption as to this young man [appellant] and what is your answer to that?

A: Well, he's innocent as of right now.

In our view, the record supports the conclusion that Levy was not prejudiced or biased against appellant. We therefore hold that the trial court did not abuse its discretion by overruling appellant's challenge for cause against Levy.

Appellant's trial counsel asserted a challenge for cause against veniremember Melissa Andrews because "she has a bias towards the death penalty, . . . she has a predisposition as to the facts of the case, . . . [and] she is not able to take those predispositions out of her mind." During the voir dire, the following colloquy occurred:

THE STATE: The issue is that you don't – can you follow the Court's instructions in making up your mind [concerning appellant's guilt or innocence] based on what you hear solely from the witness stand?

ANDREWS: Yes.

Q: Okay. Is that a definite yes?

A: Yes.

* * *

Q: See, what I'm trying to say is, you're not predisposed [on the issue of guilt/innocence] one way or the other right now?

A: Uh-huh.

Q: Are you?

A: No.

* * *

Q: In other words, you're not predisposed one way or the other to either, you know, give the death penalty or life imprisonment now? Are you predisposed right now one way or the other?

A: No.

Q: And if he's convicted of capital murder can you wait until you hear the evidence before determining how to answer [the special issues]?

A: Yes.

* * *

Q: Are you right now, at this moment, without hearing any evidence predisposed or committed to a particular punishment already?

A: No.

After considering this dialogue in conjunction with the rest of Andrews' testimony during voir dire, we hold that the trial court did not abuse its discretion by overruling a challenge for cause based upon allegations that Andrews had presumptions about the appellant's guilt and that she was predisposed to impose the death penalty.

Appellant also argues that the trial court erred by overruling his challenge for cause against veniremember Garcia because: (1) she knew one of the victims, James Smiley; (2) she could not follow an instruction to consider only the appellant's conduct and not that of his accomplice Venegas in answering the special issues during the punishment phase of trial; (3) she could not follow an instruction on murder as a lesser included offense of capital murder; and (4) the trial court prohibited appellant's counsel from asking Garcia whether she would consider evidence about the devil's influence upon the appellant. We find no evidence in the record that appellant's trial counsel asserted a challenge for cause against Garcia based upon her familiarity with Smiley or upon counsel's inability to raise questions concerning the devil's influence over his client. Those points are, therefore, not preserved for our review. Tex. R. App. Proc. 52(a), 210(a). In addition, appellant's trial counsel never obtained a ruling on his challenge for cause based upon Garcia's inability to consider murder as a lesser included offense, so that issue is not preserved either. *Id.*

We now turn to appellant's claim that Garcia, after applying the law of parties during the guilt/innocence phase, would be unable to disregard it and consider just

appellant's conduct during the punishment phase.[9] The record reveals the following discussion on this issue:

> DEFENSE COUNSEL: Now . . . you will be told by the Court in the first part of the trial to consider all of that evidence as you were told a little while ago. They even used that for you. And one of the instructions is going to be the law of parties, okay?
>
> A: Okay.
>
> Q: Now, on the second part of the trial the Court is going to tell you – forget about the parties. Only concentrate on what [appellant] did, if we get to that part. Now, so you think that you can do that? Do you think that you can watch one thing one way and then consider it in another way? Will you be able to follow that instruction?
>
> A: Follow one first and then another?
>
> Q: A little bit different but it's still going to be there.
>
> A: No.
>
> Q: You will not be able to follow such instruction?
>
> A: No.
>
> Q: Challenge the juror for cause.
>
> THE STATE: Again, Your Honor, I don't think she understands.
>
> THE COURT: That's overruled.

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[9] See discussion on appellant's first point of error *infra* concerning requirement that party liability not be applied by jury answering special issues during the punishment phase of the trial.

The party who asserts a challenge for cause carries the burden of proving by a preponderance of the evidence that the potential juror should be dismissed. *Hernandez v. State*, 757 S.W.2d 744, 753 (Tex.Crim.App. 1988), overruled on other grounds in *Fuller v. State*, 829 S.W.2d 191, 200 (Tex.Crim.App. 1992), *cert. denied*, 112 S.Ct. 2944 (1992). In our view, the questions posed to Garcia concerning application of the law of parties during the guilt/innocence phase and its prohibition during punishment were confusing and were not followed up by more pinpoint questioning to establish that Garcia would not be able to follow the court's instructions regarding application of the law of parties. As such, the trial court acted within its discretion by finding that appellant had not met his burden of showing by a preponderance of the evidence that Garcia could not follow the court's instruction to consider only the appellant's conduct in answering the special issues during the punishment phase. We therefore find no error in the court's denial of appellant's challenge for cause against Garcia. For all of the reasons discussed above, points of error numbers thirteen through seventeen are overruled.

In point of error number twelve, appellant argues that the trial court erred by excusing veniremember Leonor Gonzalez because her religious opposition to the death penalty would prevent her from voting to impose it. Appellant's specific contention is that Gonzales was improperly excused because she "had indicated that [despite her religious opposition to the death penalty] she could follow the law and fulfill her oath and duty." We disagree.

Our review of the record reveals the following exchanges during Gonzales' voir dire examination:

> THE STATE: Okay. You put down that you did not believe in the death penalty.
>
> A: No. I don't believe in it.
>
> * * *
>
> A: I guess the reason [that I do not believe in the death penalty] is that I believe in God, that he is the creator of us. We should not kill even if there is a motive. . . .
>
> * * *
>
> Q: You would answer [the special issues] no? No matter what evidence we presented, no matter who testified?
>
> A: Yeah. No matter what evidence, no matter who testified.
>
> Q: And even if the person was found guilty of capital murder and the evidence is presented to you and more evidence was presented to you and you thought that the [special issue] should be answered yes, would you find a way to answer them no just so the death penalty would not be imposed by the Court?
>
> A: Yes.
>
> * * *
>
> Q: The death penalty option wouldn't be considered by you for any reason no matter what the case, no matter what the circumstances, or what evidence?
>
> A: Yes.

At this point, the State moved to challenge Gonzalez for cause. Before ruling on the State's challenge, the trial court allowed appellant's trial attorney to examine Gonzalez. Gonzalez subsequently stated that, despite her religious opposition to the death penalty, she would follow the court's instructions and answer the special issues based on the evidence. Under re-examination by the State, however, the District Attorney explained to Gonlalez [sic] that if the jury unanimously answered both special issues in the affirmative the death penalty would be imposed. He then specifically asked Gonzalez whether she would answer one of the special issues in the negative, even if she believed that the State had proved its case beyond a reasonable doubt, simply because she did not want the appellant to receive the death penalty. In response, Gonzalez stated that she did not want to answer the District Attorney's question. Gonzalez did, however, provide the following responses:

> THE STATE: In other words, are you right now, already saying before we even start the case, that you will not consider the death penalty at all?
>
> A: No.
>
> Q: You would never consider the death penalty no matter what the facts?
>
> A: No matter what the facts.
>
> At this point, the trial court granted the State's challenge for cause against Gonzalez.

A potential juror's views on capital punishment may infringe on his ability to be impartial to such an extent that he may be challenged for cause. The standard for

determining when such a challenge is proper is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), citing *Adams v. Texas*, 448 U.S. 38 (1980).[10] We have previously applied the *Wainwright* standard to the Texas capital sentencing scheme and noted that the issue presented on appeal is "whether the trial judge abused his discretion in finding that [the potential juror] could not honestly answer the special issues because of her beliefs." *Pierce v. State*, 777 S.W.2d 399, 404 (Tex.Crim.App. 1989).

When a trial judge has sustained a challenge for cause against a veniremember, we review the decision by determining, "whether the totality of the voir dire testimony supports the trial judge's implied finding of fact that the prospective juror is unable . . . to follow the law as given by the trial judge." *Kemp v. State*, 846 S.W.2d 289, 301 (Tex.Crim.App. 1992) (citation omitted). We give great deference to the trial judge's ruling, especially when the veniremember has given vacillating and uncertain responses, because the trial judge has the advantage of being able to observe the demeanor of the veniremember during the examination. *Id.*

In this case, the record indicates that throughout her examination Gonzalez vacillated on whether or not she

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[10] For a detailed discussion of the problems that have arisen with regard to religious opposition to the death penalty and jury selection in capital cases, *See Note, At Witt's End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 Stan. L. Rev. 427 (1987).

would be able to put aside her religious objection to the death penalty and instead simply follow the court's instructions and answer the special issues based on the evidence presented. Given these facts, we hold the trial court did not abuse its discretion when it found that Gonzalez would not be able to set aside her personal beliefs when answering the special issues.

In his brief, appellant cites *Turner v. State*, 635 S.W.2d 734 (Tex.Crim.App. 1982), and argues that a veniremember in that case expressed religious opposition to the death penalty and made statements during voir dire which were very similar to those made by Gonzalez in this case. In *Turner*, we found that the trial court erred by granting the State's challenge for cause against the veniremember.

Having reviewed *Turner*, we believe its facts are distinguishable from the case at bar. In *Turner*, the veniremember at first said that she did not think that she could vote to impose the death penalty. Subsequently, defense counsel explained how the punishment phase of the trial would be conducted and read the two special issues which the jury would be required to answer. At this point, the veniremember stated *unequivocally* that she would be able to follow the court's instructions and answer the special issues. At no point did the veniremember vacillate from this position, in contrast to Gonzalez who could never bring herself to make such an unequivocal statement. Appellant's point of error number twelve is overruled.

In points of error numbers eighteen and nineteen, appellant argues that the prosecution, during closing

argument at the guilt/innocence phase of trial, twice made improper references to appellant's failure to testify at trial, in violation of appellant's rights under the Fifth and Fourteenth Amendments and Article 1, § 10, of the Texas Constitution. Appellant contends that the trial court erred by overruling his objections to said statements. The State asserts that the remarks made during closing were references to the failure of the defense to elicit exculpatory testimony from two of the witnesses at trial and did not refer to the failure of the defendant to testify in his own defense.

The first statement made by the State and complained of by appellant is the following:

> THE STATE: [The appellant on the Monday after the murders] goes to school to have another regular day, and after the pressures of school, that evening, he goes with his friends to drink a beer and smoke a joint. What a guy. What a guy. You can deduct (sic) from that that there was no remorse. Did he call the police? Did he feel bad? Did he feel guilty[?] Did he call the hospital for help?
>
> DEFENSE COUNSEL: Objection, Your Honor. Counsel is making references to the fact that the defendant did not testify . . . and defend himself.
>
> THE COURT: It's overruled.

Prior to these remarks, the State had called appellant's friend Manuel Flores to the stand. Part of Flores testimony focused upon how appellant appeared three days after the murders:

THE STATE: All right. And when you saw [appellant], did you have a chance to see him and observe him –

A: Yes.

Q: – when you were at school? And what did you observe, if anything?

A: That he was acting sort of excited.

Q: Okay. What do you mean by "excited"?

A: Like, uh, if he just won a million dollars.

Arturo Estevez also testified about appellant's conduct three days after the killings:

DEFENSE COUNCEL [sic]: Did – what did [appellant] do in your presence?

A: He was drinking.

Q: Drinking what?

A: Beer.

* * *

Q: Did [appellant] smoke anything that night?

A: Yes . . . Several marijuana cigarettes.

Q: Pass the witness, Judge.

THE STATE: How did [appellant] appear to you?

A: Appeared (sic) stoned, buzzed, and that's it.

Q: Did he look worried?

A: Worried? No, sir.

Q: Was he having a good time?

A: Yes, basically. Just talking regularly.

Given this prior testimony, we believe that the trial court could reasonably have found that the State's comments refered [sic] to the absence of any exculpatory testimony concerning the demeanor and appearance of appellant on the Monday after the murders. Such a reference is not an improper comment on a defendant's failure to testify.

The State also made the following comment during closing argument, which appellant again believes was improper:

> THE STATE: . . . The evidence is there. Don't believe the smoke screen that the defense attorneys are trying to put up. Don't be confused about any other people that may be involved. Your job today is to determine the guilt or innocence of the [appellant] as he's admitted it. It's uncontradicted. There is no evidence –
>
> DEFENSE COUNSEL: Objection, Your Honor. That is improper because he's the only witness that can contradict it and would have been the [appellant] and that makes a reference as to how come he did not testify.
>
> THE COURT: It's overruled.

This State's comment did not refer to the fact that appellant failed to take the stand in his own defense. A statement which does not specifically refer to the defendant's failure to testify may nevertheless refer to the

defendant's failure to testify may nevertheless be construed as a comment on that situation in violation of the defendant's right against self-incrimination. A prosecutor's comment will be found to violate that right if it is "of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." *Livingston v. State*, 739 S.W.2d 311, 337-38 (Tex.Crim.App. 1987), *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2858, 101 L.Ed.2d 895 (1988) (citations omitted). More specifically, a prosecutor's comment necessarily calls the jury's attention to the fact that the defendant has not testified when the comment:

> call[s] for a denial of an assertion of fact or contradictory evidence that *only the defendant is in a position to offer* . . . If the language used can be reasonably construed as referring to the appellant's failure to produce testimony or evidence from sources other than himself, reversal is not required.

Id. (Citations omitted and emphasis added.)

In this case, the State asserted that appellant's admission of guilt in his confession was "uncontradicted." If appellant had been the only person who could have taken the stand to contradict the confession, then the prosecutor's statements would have been impermissible commentary on the defendant's failure to testify and the objection to them should have been sustained. We do not believe, however, that this was the case, as appellant's confession of guilt could have been contradicted by testimony from Manuel Venegas that appellant was not present at the murder scene, or that appellant was present but did not aid or assist in the killings.

In sum, we believe that the assertions made by the State during closing argument, and objected to by appellant, can reasonably be interpreted as comments on the failure of the defense to provide exculpatory evidence from sources other than appellant. As such, the statements were not impermissible commentary on appellant's failure to testify at trial. Points of error numbers eighteen and nineteen are overruled.

Appellant contends in his twenty-second point of error that, during closing argument at the guilt/innocence phase of the trial, the State offered an incomplete explanation of the accomplice-witness rule[11], and that the trial court erred by overruling appellant's objection to this explanation. The record reflects that the following statements were made before the jury during closing argument:

> THE STATE: Now, under accomplice testimony, there's an instruction there in reference to Manuel R. Flores. First of all, you have to find beyond a reasonable doubt – was he an accomplice or not? If he's not an accomplice then you go ahead and take his testimony into consideration without anything else that you have to do. Okay. If you find that he's an accomplice, that doesn't eliminate his testimony. What it does is – is that testimony corroborated by

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[11] The Texas accomplice-witness rule is contained in Article 38.14, and reads as follows:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

> other testimony? Is there other testimony throughout the trial that substantiates, corroborates, supports –
>
> DEFENSE COUNSEL: Objection, your Honor, that is not a complete statement of the law.
>
> THE COURT: Well, it's overruled. It's a shorthand version of it. I've given them what the law is.[12] Overruled, counsel.

Our review of the record indicates that the objection by appellant's trial counsel interrupted the State's argument in mid-stream, which effectively prevented the State from completing its explanation of the accomplice-witness rule. Appellant's trial counsel therefore placed himself in the awkward position of complaining that the State's explanation of the applicable law was incomplete when the objection itself prevented the State from completing its explanation. We also note that at the time of the objection, the State had made no inaccurate statements about the requirements of the accomplice-witness rule, because corroborating evidence is needed before a conviction can be based upon an accomplice's testimony. Given these particular facts, we find that the trial court

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[12] The court's charge for the guilt/innocence phase of the trial contained an instruction on accomplice testimony which accurately set forth the requirements of the Texas accomplice-witness rule, including the following:

> [Y]ou cannot convict unless the accomplice's testimony is corroborated by other evidence tending to connect the defendant with the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission.

acted properly by overruling the objection and noting for the benefit of the jury that the State had given a "short-hand version" of the accomplice-witness rule and that the jury had been instructed on exactly what the law required.

In his brief, appellant argues that the State again made an incomplete statement about the requirements of the accomplice-witness rule during the rebuttal stage of closing argument. Our review of the record, however, reveals that appellant's trial counsel did not object on the grounds that the State had misstated the law but rather objected that the prosecution was "testifying outside the Record." Appellant has failed to preserve error on the issue of whether the State misstated the law of accomplice testimony during the rebuttal phase of closing argument. Point of error number twenty-two is overruled.

In his first point of error, appellant contends that the trial court erred by failing to include an "anti-law of parties" instruction in the punishment-phase jury charge, specifying that only the defendant's conduct could be considered in answering the special issues and that the law of parties did not apply. To guide its deliberations during the guilt/innocence phase of appellant's trial, the jury received a twelve-page charge, which included an instruction applying the law of parties and requiring a verdict of guilty on the capital murder charge if the jury found that appellant intentionally aided and assisted Miguel Angel Venegas in carrying out the three killings.[13]

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[13] The specific language in the charge reads:

[I]f you find from the evidence beyond a reasonable doubt that on or about the 18th day of January, 1991,

After return of a guilty verdict, the trial moved into the punishment phase, during which the jury listened to additional testimony relevant to their consideration of the special issues. The jury then received the punishment charge from the court, which read in relevant part:

> You are further instructed that in answering the issues submitted to you, you will confine yourselves, in answering the following issues to the conduct of the defendant standing alone.

Subsequently, both special issues were answered in the affirmative and punishment was assessed at death.

The law of parties may not be applied to the three special issues under Art. 37.071(b). *Green v. State*, 682

> in Webb County, Texas, MIGUEL ANGEL VENEGAS did intentionally or knowingly cause the death of more than one individual, in the same criminal transaction, to-wit: JAMES D. SMILEY, DANIEL DUENEZ, and RUBEN MARTINEZ, JR., with a deadly weapon, to-wit: a knife, that in the manner of its use or intended use was capable of causing serious bodily injury or death, and by striking JAMES D. SMILEY and RUBEN MARTINEZ, JR., with an axe, and that the defendant, MIGUEL ANGEL MARTINES [sic], then and there knew of the intent, if any, of said MIGUEL ANGEL VENEGAS, to stab JAMES D. SMILEY, DANIEL DUENEZ, and RUBEN MARTINEZ, JR., and the defendant, MIGUEL ANGEL MARTINEZ, acted with intent to promote or assist the commission of the offense by MIGUEL ANGEL VENEGAS by aiding or attempting to aid, MIGUEL ANGEL VENEGAS to commit the offense of murder, causing the deaths of JAMES D. SMILEY, DANIEL DUENEZ and RUBEN MARTINEZ, JR., you will find the defendant, MIGUEL ANGEL MARTINEZ, guilty of capital murder as charged in the indictment;. . . .

S.W.2d at 287, overruling *Wilder & Armour v. State*, 583 S.W.2d 349 (Tex.Crim.App. 1979). The reason for excluding party liability during the punishment phase of a capital trial is that the Eighth and Fourteenth Amendments allow a sentence of death to be imposed only upon a defendant "shown to be culpable due to his own actions, intentions, and expectations and not those of his cohorts." *Green*, 682 S.W.2d at 287 (applying *Enmund v. Florida*, 102 S.Ct. 3368 (1982)); *see also Tison v. Arizona*, 107 S.Ct. 1676 (1987).

The state may benefit from an instruction on the law of parties in the jury charge during the guilt/innocence phase. Such an instruction, however, is intentionally omitted from the punishment-phase charge because of the Eighth Amendment requirements discussed *supra*. Nevertheless, omission of a law of parties instruction during the punishment phase is an insufficient protection of the defendant's Eighth Amendment rights, as a risk remains that the jury may mistakenly apply the law of parties if party liability was an issue during the guilt/innocence phase of the trial. To avoid such confusion and to protect the defendant's rights, we have held that:

> where a law of parties charge is given during the guilt/innocence phase of a capital case a prophylactic instruction should be given, if requested, which would instruct the jury to limit its consideration of punishment evidence to conduct shown to have been committed by the defendant.

Belyeu v. State, 791 S.W.2d 66, 72 (Tex.Crim.App. 1989), *cert. denied*, 499 U.S. 931 (1991), citing *Marquez v. State*, 725 S.W.2d 217, 225 (Tex.Crim.App. 1987). Such an instruction

has come to be known as an "anti-parties" charge. *See Belyeu*, 791 S.W.2d at 73.

In the instant case, an anti-parties charge was appropriate to prevent jury confusion. Contrary to appellant's contentions, however, such a charge *was* submitted to the jury during the punishment phase of the trial where, directly above the listing of the special issues, the trial judge ordered the jurors "[to] confine yourselves, in answering the following issues to the conduct and acts of the defendant *standing alone.*" (Emphasis added.) Appellant suggests that this language was not an anti-parties charge because, in his view, the trial court needed to further instruct the jury that the instructions pertaining to the law of parties given during the guilt/innocence phase of the trial should not be considered. We disagree.

We have never held that any particular language must be used before an instruction will be deemed an anti-parties charge, and we decline to establish such a rule today. Rather, an instruction qualifies as an anti-parties charge if it accomplishes the purpose for which it is intended – namely, if it protects the defendant's constitutional rights by ensuring that a jury's punishment-phase deliberations are based solely upon the conduct of that defendant and not that of another party. We find that the instruction given in this case met this standard and therefore constituted an anti-parties charge. This rationale is supported by our prior holding in *Hawkins v. State*, 660 S.W.2d 65, 81-82 (Tex.Crim.App. 1983), where we noted that, "[w]hen a refused charge is substantially the same or is adequately covered by the charge given, there is no harm in failure to give the refused instruction." Appellant's first point of error is overruled.

Appellant alleges in his twenty-sixth point of error that imposition of the death penalty in this case is unconstitutional because he was under eighteen years of age at the time of the offense. Specifically, appellant cites the International Covenant on Civil and Political Rights, which was signed by the President and ratified by the United States Senate in 1992. Article 6 of that covenant reads in part:

> 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

999 U.N.T.S. 171, 175 (1976). Appellant contends that the Supremacy Clause of the United States Constitution[14] makes this prohibition applicable to the states and thereby renders unconstitutional any death sentence imposed on an individual under the age of eighteen. We disagree.

When the Senate ratified the cited covenant, it specifically included numerous limitations, including the following:

> I. The Senate's advice and consent is subject to the following reservations:
>
> * * *
>
> (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other

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[14] Article VI, clause 2, of the United States Constitution (the Supremacy Clause) provides in part: "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land. . . . "

> than pregnant women) duly convicted under existing or future laws permitting the imposition of capital punishment, *including such punishment for crimes committed by persons below 18 years of age.*

Exec. Rept. No. 102-23, 102d Cong., 2d Sess., IX at 21-22 (emphasis added). Given this clear limitation on the effect of the covenant, appellant's point of error number twenty-six is overruled.

In points of error numbers two through five, appellant contends that we must grant him a new trial because a number of items which were part of the trial record have been lost or destroyed through no fault of his own. The particular items at issue include a bill of exception listing proffered voir dire questions which were excluded by the trial court, and three written witness statements, one each from Raymond Guiterrez, Abdon Ibarra, and Orlando Lopez. Appellant asserts that the omission of these items entitles him to a new trial under Texas Rule of Appellate Procedure 50(e).[15] The State argues that the bill of exception and the written witness statements were

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[15] Tex. R. App. Proc. 50(e) reads:

> **(e) Lost or Destroyed Record.** When the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. *If the appellant has made a timely request for a statement of facts, but the court reporter's notes have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.*
>
> (Emphasis added.)

never formally made a part of the record by the appellant, and as such appellant is entitled to no relief under Rule 50(e). The State's analysis is correct.

The record indicates that during voir dire appellant's trial counsel possessed a poster board exhibiting a series of questions which he proposed to ask of potential jurors. The trial court sustained the State's objection to those questions on the basis that they were an attempt to commit the potential jurors to a particular course of conduct. The judge then informed defense counsel that he needed to offer the questions as a bill of exception outside the presence of the veniremembers to perfect the record for appeal. Appellant, however, fails to cite, and we have been unable to locate, any place where the poster or a list of its contents were read into the record as a bill of exception.

Appellant has the burden of ensuring that the trial record is sufficiently complete to show reversible error. Tex. R. App. Proc. 50(d). Because appellant failed to offer a bill of exception listing the questions which he was prevented from asking during voir dire, the fault for the omission of the information lies with appellant. Rule 50(e) requires that appellant not be at fault for the omission in the record. Point of error number two is overruled.

The record indicates that appellant's trial counsel also attempted to offer into evidence prior written statements by Raymond Guiterrez, Abdon Ibarra, and Orlando Lopez, during his cross-examination of these individuals. The State's objections to the admission of

these documents were sustained by the trial court. Appellant fails to cite any place in the record where he subsequently requested a bill of exception to incorporate the documents into the record to perfect his appeal. We again find that appellant failed to meet his burden to perfect the record as required by Rule 50(d), and that Rule 50(e) is therefore inapplicable. Points of error numbers three through five are overruled.

The judgment of the trial court is AFFIRMED.

CAMPBELL, J.

(Delivered December 14, 1994)

En Banc

Publish in part. Only the discussion of point of error number one, beginning with the last paragraph on page twenty-seven and ending immediately before the first full paragraph on page thirty, is designated for publication. The remainder of the opinion shall not be published. *Rabbani v. State*, 847 S.W.2d 555 (Tex.Crim.App. 1992).

Clinton, J., dissents.